"it was a condition precedent that the appellant should resort to the domestic remedies provided before resorting to the courts."

Mr. Xavier referred to the case of *Kolandaisamy* v. *Annamalai and The Harbour Trade Union (Selangor) Port Swettenham*[2] where Gill J. (as he then was) said —

"as the rules of the union provided that any dispute between a member and the union should be decided by reference to arbitration, the only way in which such dispute could come before the High Court was by way of a case stated for its opinion on any question of law as provided under section 45 of the Trade Unions Ordinance. Therefore in this case the court had no jurisdiction to hear and adjudicate."

Mr. Xavier also drew my attention to *Muthuraku* v. *Kuala Lumpur Municipality Workers Trade Union*[3] where Ong C.J. (as he then was) held that —

"under the rules of the trade union the dispute could only be referred to the Registrar of Trade Unions by consent of the parties, and as the appellant did not agree to do so, he was entitled to refer the matter to the court."

Mr. Karam Singh Veriah counsel for the applicants said that parties cannot be forced to go before the Registrar of Trade Unions.

There is something in what Mr. Karam Singh Veriah said but to my mind it is quite apparent that the applicants had not even applied their minds to the question of reference to the Registrar of Trade Unions for them to say that they cannot be forced to go before the Registrar. In the present case, the constitution and rules of the National Union of Plantation Workers provides that —

"...a dispute connected with (a) the election of officers of the Union; or (b) the accounts and funds of the Union; or (c) the non-compliance with any Rule of the Union, the parties to the dispute may, by consent, refer the dispute to the Registrar of Trade Unions."

I am of the view that the applicants ought to have exhausted all the domestic remedies before coming to court.

In the present case it is also clear that the applicants had done nothing for about two years and six months. If they had any genuine complaint they ought to have referred the matter to the Registrar of Trade Unions or alternatively instituted court action against the union immediately or within reasonable time.

It is my judgment that the applicants have not acted *bona fide*. There was a very long delay and no valid reason was given for such delay.

It is my considered judgment that this is not a proper case for this court, in exercising its discretionary power, to grant the order sought.

The motion was therefore dismissed with costs.

Motion dismissed.

WAH LOONG (JELAPANG) TIN MINE SDN. BHD. v. CHIA NGEN YIOK

[O.C.J. (Abdoolcader J.) April 4, 1975]
[Ipoh — Civil Suit No. 83 of 1974]

Practice and Procedure — Injunction — Interim injunction — Mandatory injunction — Principles applicable — Relief sought practically answers whole claim.

There is no reason when an interim or interlocutory injunction is either refused or later discharged why a subsequent application cannot be made in the light of the changed circumstances or when otherwise so warranted. Indeed it is settled law that when such an injunction is either refused or dissolved as the case may be, on the grounds that material facts had not been disclosed, the plaintiff nonetheless does not become anathema for all purposes but may, if he wishes make application *de novo*.

Sometimes however the circumstances in which an interlocutory injunction is made are such that if an interlocutory injunction is granted the benefit or advantages which the plaintiff thereby receives are all, or practically all, the benefit or advantages which are sought to be secured at the final hearing. It does not follow that in such a case an interlocutory injunction will be refused. The question remains one of the balance of convenience in all the circumstances.

An interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases.

Cases referred to:-

(1) *W. Edge & Sons Ltd.* v. *Niccolls Ltd.* [1911] 1 Ch. 1, 9.
(2) *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, 96, 98.
(3) *Evans Marshall & Co. Ltd.* v. *Bertola S.A. & Anor.* [1973] 1 W.L.R. 349, 379.
(4) *Jones* v. *Pacaya Rubber & Produce Co. Ltd.* [1911] 1 K.B. 455, 457.
(5) *Taxaco Ltd.* v. *Mulberry Filling Station Ltd.* [1972] 1 All E.R. 513.
(6) *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe des Etains de Bayas Tudjuh* [1974] 1 M.L.J. 145.
(7) *Leong Chek Pong & Anor.* v. *Lee Chick Yet* [1964] M.L.J. 209.
(8) *Lim Kim Choy* v. *Wong Chow* [1952] M.L.J. 20.
(9) *Wong Chow* v. *Looi Kim Choy* [1953] M.L.J. 81.
(10) *Willmott* v. *Barber* (1880) 15 Ch. D. 96.
(11) *Warmington & Anor.* v. *Miller* [1973] 1 Q.B. 877.
(12) *Fountain Forestry Ltd.* v. *Edwards & Anor.* [1974] 2 W.L.R. 768.
(13) *The Mogul Steamship Company* v. *M'Gregor, Gow, & Co.* (1885) 15 Q.B.D. 476.
(14) *Woodford* v. *Smith* [1970] 1 W.L.R. 806.

CIVIL SUIT.

Colin R. Clark for the plaintiffs.

J. R. Devadas for the defendant.

Abdoolcader J.: There are before me cross applications by the plaintiffs and the defendant for interlocutory injunctions in a matter in which such applications would seem to be the order of the day, as, quite apart from these two applications, there have been two other applications, in one of which an injunction was granted but subsequently discharged and in the other an injunction was granted subsequent to and pending the hearing of the present two applications. I would have thought, like Cozens-Hardy M.R. in *W. Edge & Sons Limited* v. *Niccolls Limited*,[1] that in the circumstances the court ought to have been asked to grant not interlocutory injunctions but a speedy trial but unfortunately counsel on both sides had frankly to admit when I raised this that the action is not yet

ready for trial. In any event, the cross applications, adjourned for hearing on several occasions, were ultimately set down and argued before me and it now becomes my duty to deal with them. Although the two applications in form purport to seek perpetual injunctions they are clearly intended to be no more than applications for interlocutory orders pending the trial of this action.

The plaintiffs filed this action on March 11, 1974, for specific performance of a Permit to Mine dated March 6, 1973, whereby they were permitted by the defendant to work the mining land known as Lot 34222 in the Mukim of Blanja in the District of Kinta, Perak, held under Mining Certificate No. 5083 in respect of which the defendant is sub-sub-lessee under a sub-sublease of a sublease. Briefly the defendant contracted to allow the plaintiffs to work the land for a period of one year and agreed to renew the Permit yearly for the term of the Mining Certificate and the renewals thereof until the land is completely worked out. The defendant refused to renew the Permit on its expiry after the first year and hence these proceedings. The plaintiffs also claim an injunction to restrain the defendant from entering on the land or interfering with them, an order for the Senior Inspector of Mines to renew the hydraulic licence in their name and, alternatively, damages for breach of contract. The defendant has filed an amended defence raising several defences and alleging breaches on the part of the plaintiffs entitling the defendant to refuse to renew the Permit to Mine. The defendant has further counterclaimed for a declaration that the Permit is void and of no effect and that it be cancelled, a mandatory order commanding the plaintiffs to cease mining operations and remove their machinery and properties from and vacate the land, an injunction prohibiting the plaintiffs from entering on or occupying the land or carrying on mining operations thereon and interfering with the defendant in her mining operations, an order prohibiting the Senior Inspector of Mines from issuing any hydraulic licence to the plaintiffs and directing him to issue one to the defendant as from March 6, 1974, and general and special damages.

The aftermath of the institution of these proceedings has been a chequered history of bilateral exuberance of interlocutory applications and copious affidavits in support and in reply.

The plaintiffs in the first instance filed an application inter partes on March 11, 1974, for an injunction to restrain the defendant from entering on to the land or interfering with their mining operations and for an order to the Senior Inspector of Mines to renew the hydraulic licence in their name. On March 21, 1974, the defendant filed a Motion for an order directing the plaintiffs to forthwith dismantle and remove all their mining machinery buildings and properties from the land in question, an injunction to restrain the plaintiffs from entering occupying or carrying on mining operations thereon and interfering with mining operations by her, an order prohibiting the Senior Inspector of Mines from issuing any hydraulic licence to the plaintiffs and directing him to issue one to her and an order that the plaintiffs' application dated March 11, 1974, be dismissed with costs. This application of the defendant is one of the cross applications before me.

On March 22, 1974, Sharma J. made an order on the plaintiffs' application restraining the defendant from working the land on an undertaking by the plaintiffs to furnish security by way of a bond in the sum of $400,000 with two sureties, ordering the Senior Inspector of Mines to renew the hydraulic licence in the name of the plaintiffs and giving liberty to the defendant to apply to set aside that order. The defendant then applied by a Motion dated April 9, 1974, to set aside the Order of March 22, 1974, and to grant the relief prayed for in her application of March 21, 1974. On April 26, 1974, Sharma J. on hearing the two applications of the defendant which I have referred to and on being informed that no bond as ordered had been furnished by the plaintiffs, discharged his Order of March 22, 1974, and adjourned the defendant's Motion of March 21, 1974. The plaintiffs then again applied by way of Motion dated May 30, 1974, for orders to restrain the defendant from working the land and for the Senior Inspector of Mines to renew or extend the hydraulic licence in their name. This is the second of the cross applications before me in this matter, and was adjourned for hearing on several occasions until it came on before me to be heard together with the defendant's Motion of March 21, 1974.

Pending the hearing of these two cross applications it would appear from an affidavit filed on behalf of the plaintiffs that there was some alleged interference with their rights by the defendant and this led to an application by the plaintiffs by way of Summons in Chambers dated October 14, 1974, on a certificate of urgency for an injunction to restrain the defendant from entering on to the land. Arulanandom J. made an order in terms of that application on October 22, 1974, and gave liberty to apply. This was the state of affairs when these two cross applications which I have referred to were heard by me, and both parties agree that if one of the applications succeed, the other must of necessity fail and be dismissed.

Before dealing with the facts of this matter raised in the course of the hearing of these two applications and the several contentions put forward on both sides, I think it might perhaps be useful and desirable to set out a synopsis of the well-established principles which govern the grant or refusal of a temporary or interlocutory injunction which are:

(1) whether the plaintiff (and a defendant is for the purposes of his counterclaim in the position of a plaintiff) has made out a *strong prima facie case*, showing a strong probability of the existence of the legal right on which he sues and a right to the final relief claimed; but the fact that the plaintiff has made out a *prima facie* case does not necessarily mean that an interlocutory injunction will issue as of course;

(2) whether the *balance of convenience* is in the plaintiff's favour and requires an injunction to protect it, *i.e.* whether it would cause greater inconvenience to the plaintiff if the injunction is not granted than the inconvenience which the defendant or persons claiming through him would be put to if the interlocutory injunction is granted;

(3) whether the plaintiff will in fact suffer *irreparable injury;*

(4) whether the case is one in which in the event of success in the suit the plaintiff will not have a proper remedy in being awarded *adequate damages;*

(5) whether there is *clear necessity for affording immediate protection* to the plaintiff's alleged right or interest;

(6) the maintenance and preservation of the *status quo* pending the trial;

(7) an interim or interlocutory mandatory injunction is never granted before trial except in exceptional and extremely rare cases;

(8) an injunction is a discretionary remedy granted only at the discretion of the court on the basis of the principles of equity and on a consideration of the facts and circumstances viewed in the light of the legal considerations hereinbefore adumbrated.

It is however necessary to view and consider these principles in the light of some recent decisions.

In *Hubbard* v. *Vosper,*[2] the Court of Appeal held that a plaintiff is not entitled to an interlocutory injunction simply because he shows that *prima facie* he has a right and shows an arguable case that the defendant has infringed that right. The whole case should be looked at and the remedy by interlocutory injunction should be left flexible and discretionary. Taking the principles from Lord Denning M.R.'s judgment in that case, a plaintiff has to prove, first, a strong *prima facie* claim to his right or rights, and, secondly, an arguable case that the defendant has infringed that right or is about to infringe it. Thirdly, Lord Denning M.R. said:

"In considering whether to grant an interlocutory injunction, the right course of a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done."

Megaw L.J., said:

"Each case must be decided on a basis of fairness, justice and common sense in relation to the whole issues of fact and law which are relevant to the particular case."

In *Evans Marshall & Co. Ltd.* v. *Bertola S. A. And Another,*[3] a decision of the Court of Appeal, Sachs L.J., said:

"The standard question in relation to the grant of an injunction, 'Are damages an adequate remedy?', might perhaps, in the light of the authorities of recent years, be rewritten: 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?'."

I must also remind myself of the words of Buckley L.J., in *Jones* v. *Pacaya Rubber & Produce Co. Ltd.*: [4]

"In all cases of applications for interlocutory injunctions the governing principle is that pending the settlement of the dispute between the parties the court will as far as possible keep matters in *status quo.*"

In *Texaco Ltd.* v. *Mulberry Filling Station Ltd,*[5] it was held that in applications for interlocutory injunctions generally, the governing consideration is the maintenance of the status quo pending the trial; the maintenance of such status quo means in general the maintenance of the contemporary situation including what had resulted from past violations of the plaintiff's *prima facie* right but excluding any repetition of the violations; in deciding whether such status quo should be maintained, regard must be had to the balance of convenience and the extent to which any advantage to the plaintiff could be cured by the payment of damages rather than by granting an injunction.

Adverting now to the facts of the matter, the position of the plaintiffs briefly is that they were at the commencement of these proceedings and at all material times and still are and continue to be in possession of the land and claim to be entitled as of right to a renewal of the Permit to Mine by virtue of the provisions of Clause 16 thereof which I have already referred to.

In *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe des Etains de Bayas Tudjuh,*[6] the Federal Court held that a permit to mine was in substance a sublease though not in the statutory form and equity would treat it as an agreement for a sublease and specifically enforce it, and that the permittee had therefore a right in equity to a registrable interest in the land and in consequence a caveatable interest under the National Land Code. In *Leong Chek Pong & Anor.* v. *Lee Chick Yet,*[7] the Federal Court had also held that the appellants under a contract of this nature permitting them to carry out mining operations on the respondent's mining land held under a mining certificate were entitled to specific performance of the agreement.

The plaintiffs claim to have established a strong *prima facie* case entitling them to the relief sought. Although in possession of the land, the plaintiffs are not in a position to carry on mining operations thereon without a hydraulic licence issued by the Senior Inspector of Mines which however will only be issued on the production of a Permit to Mine from the defendant in their favour. There is accordingly a stalemate which the plaintiffs submit can only be resolved by the court granting the orders sought by them to maintain the status quo pending the trial of this action. They claim in the circumstances to have an unqualified right to the renewal of the Permit to Mine by virtue of its very terms.

On the balance of convenience, the plaintiffs contend that this is overwhelmingly in their favour and that the defendant is only entitled to 3½ per centum of the gross production of tin ore whereas the plaintiffs are entitled to 84 per centum, the remaining 12 per centum being payable to the lessee and sublessees with a half per centum, as I understand it, to a broker. The plaintiffs contend that the alleged breaches of the agreement attributed to them have been waived by the defendant but that in any event she can be compensated adequately in damages, and, indeed, there are in fact provisions to this effect in Clauses 4 and 13 of the Permit. The plaintiffs claim that with the maintenance of the status quo the defendant will still continue to receive the agreed tribute with no jeopardy to her position and that if there had been or are any breaches on the part of the plaintiffs she will be entitled to adequate compensation in damages.

The first point raised on behalf of the defendant is that the Order made on April 26, 1974, discharging the Order made on March 22, 1974, has resulted in *res judicata* and that it is not open to the plaintiffs to

apply again for an interlocutory injunction against the defendant. I cannot countenance any such contention as the Order of March 22, 1974, was made on an interlocutory application and was discharged by the Order of Sharma J. on April 26, 1974, only on the ground that the security ordered had not been furnished by the plaintiffs; there was no final adjudication of any kind. I can see no reason when an interim or interlocutory injunction is either refused or later discharged wny a subsequent application cannot be made in the light of changed circumstances or when otherwise so warranted. Indeed it is settled law that when such an injunction is either refused or dissolved, as the case may be, on the grounds that material facts had not been disclosed, the plaintiff nonetheless does not become anathema for all purposes but may, if he wishes, make application de novo.

I would only add that if there is any substance at all in this contention then surely the Order made on October 22, 1974, by Arulanandom J. granting an interlocutory injunction to the plaintiffs would have been equally precluded but this point was neither raised nor taken then. It is only when I put this question to Mr. Devadas for the defendant and pressed him for an answer that he had to concede that on the same argument the Order of October 22, 1974, must of necessity also be invalid although this point was not made at that time.

The next point taken by the defendant is that the Permit to Mine lapsed on June 5, 1973, in view of the provisions of Clause 12 thereof to the effect that the plaintiffs shall commence mining operations on the land within 3 months from the date of the Permit failing which the Permit shall be treated as cancelled. The plaintiffs however contend that they were making the necessary preparations by applying for the requisite approvals, making the proper applications and constructing the required structures. The final approval subject to conditions appears to have been given to the plaintiffs by the Mines Department on September 6, 1973, and the plaintiffs contend that as they had made all the necessary applications and preparations within the period of 3 months, they have in fact complied with Clause 12. Neither side cited any authority for the connotation of the words "mining operations", but it would appear to me that mere preparatory work of the nature carried out by the plaintiffs cannot amount to mining operations. In *Lim Kim Choy* v. *Wong Chow*[8] (affirmed by the Court of Appeal sub. nom. *Wong Chow* v. *Looi Kim Choy*[9]), Thomson J., (as he then was) held that "mining operations" must include every and any physical act which is designed to produce the effect of "mining" as defined in section 3 of the Mining Enactment. It would appear therefore that the plaintiffs were *ex facie* in default of Clause 12.

Non-compliance with Clause 12 however would, according to its very terms, seem to result only in the Permit being treated as cancelled and not, for example, as being null and void immediately thereupon. It would appear to me from the affidavits, on an *ex facie* view, that far from treating the Permit as cancelled by virtue of the provisions of Clause 12, the defendant gave her consent to the proposed deviation of Sungei Tumboh in a letter to the Inspector of Mines, Batu Gajah, dated July 5, 1973, which was well beyond the 3-month period and she moreover accepted tribute under the Permit throughout the period of one year right up to the very last moment. It would seem therefore that she has in fact by conduct waived the provisions of Clause 12 and her rights thereunder and elected to treat the Permit as subsisting at all material times.

The defendant then submits that there was no consideration for the Permit to Mine and that it was a voluntary agreement as the usual consideration of $1 was missing. There seems to be clearly a two-fold consideration in the Permit in that the defendant allowed the plaintiffs to work the land in consideration of a tribute of 3½ per centum and also received a deposit of $6,000 to be repaid in accordance with the provisions of the Permit.

It is then argued that the Permit to Mine is not in the proper form as there is no provision for cancellation like that appearing in Clause 8 in the form for a memorandum of sublease in Schedule X to the Mining Enactment. It is not necesary to go intricately into the merits of this contention for the purposes of these interlocutory applications but this form of Permit to Mine was accepted by the Department of Mines on the strength of which a hydraulic licence was issued to the plaintiffs in 1973. This form follows the accepted practice recognised by the Department of Mines, and without going into a detailed consideration for the purposes of the applications before me of the validity of the Permit in this case I need only make reference to the provisions of sections 16 and 18, the definition of "occupier" in section 3 (defined to *include* and not to mean the persons therein specified) and section 37 of the Mining Enactment.

The defendant then complains of a material alteration to Clause 14 of the Permit after execution without her knowledge and also of certain words appearing in Clause 2 thereof which she said she never agreed to. It is impossible to resolve this matter on affidavits but in my view it is not necessary to go further at this stage than to state that there is an affidavit by the solicitor who acted for both parties in drawing up the Permit to Mine in which he denies the allegations of the defendant. This may still leave the point raised at large but in any event the matters complained of in this context are not material to and do not seem to affect the rights of the parties in any way for the present purposes.

The defendant also argues that before the plaintiffs can establish a *prima facie* case for specific performance they must specifically aver that they are ready and willing to perform their obligations under the Permit. There is indeed clear affirmation by the plaintiffs to this effect in paragraph 4 of their Statement of Claim.

The defendant also raises a number of breaches of the terms and conditions of the Permit but it is not necessary to go into this aspect in any detail save to state that acts of waiver resulting in estoppel on her part seem to have been appropriately raised by the plaintiffs on the affidavits, and I am not satisfied that these breaches go to the root of the agreement in which event the defendant would only be entitled

to damages if she succeeds on this aspect. The plaintiffs admit that there was some delay in giving notices of washing but contend that this went without complaint until towards the end of the period of the Permit and that these points were raised only because the defendant, on becoming aware of the total production and gross sales of all tin produced from the land and realising the price of tin ore was rising very sharply as shown in the production statements, started having second thoughts about receiving a bare 3½ per centum tribute from the plaintiffs, and desiring to reverse the position of advantage took the stand which she has and which has resulted in these proceedings.

The defendant goes on to say that Clause 16 of the Permit providing for yearly renewals until the land is completely worked out is only an agreement to enter into a contract which the law does not recognise. I need say no more save to reject this argument as without substance. Clause 16 *ex facie* imposes an obligation on the defendant to extend the agreement on a yearly basis and the terms of renewal are definite and certain.

The defendant then claims that the plaintiffs are debarred by their conduct from relief by way of an injunction because of the change of production figures in the affidavits. What happened was that the Managing Director of the plaintiffs in support of their application for an injunction gave certain production figures which were later found to be incorrect and amended by another affidavit. These figures were given for the purposes, it would seem to me, of determing the amount of security that the plaintiffs might be expected to furnish in the event of an order being granted in their favour as the plaintiffs have clearly stated that it would be necessary and desirable that some security in a reasonable amount based on production figures be provided by whoever works the land in order to obviate fly-by-night operations and dissipation of the proceeds resulting subsequently in an empty judgment. The plaintiffs have voluntarily offered to provide such security in a reasonable amount to be determined by the court in the light of the production figures they have given in their affidavits.

The defendant, however, states that the purported mistake in the production figures furnished which were subsequently corrected is a sign of bad faith on the part of the plaintiffs who have therefore not come to court with clean hands. I cannot see that this is necessarily or indeed so as in any event all details of production have in fact been transmitted to the defendant and they are in fact aware of the total production and gross sales. The figures given for the purpose of the security to be provided are in fact a matter of mathematical calculation and an error in one affidavit has been rectified in a subsequent affidavit with the explanation that there had been a miscalculation.

The defendant then alleges that any injunction granted to the plaintiffs would result in hardship to her as by the terms of Clause 7 of the sub-sublease in her favour she is not entitled to transfer or assign the sub-sublease without the written authority of the sub-lessees. It is true that there are cases where specific performance has been refused in circumstances where if an agreement is performed in specie there will take place a breach of an agreement entered into previously between the defendant and a third person, but it is not yet clear how wide is the principle which is applied by courts of equity in the circumstances of this nature, and, in particular, whether the same discretionary considerations arise in all cases where a grant of specific performance might cause a breach to take place of an earlier agreement (*Willmott* v. *Barber*;[10] *Warmington and Another* v. *Miller*;[11] *Fountain Forestry Ltd.* v. *Edwards and Another*[12]).

It is, however, not necessary to consider the legal aspect of this submission as it would seem apparent that the sub-lessees and lessee have full knowledge of this Permit to Mine granted by the defendant to the plaintiffs and that they had accordingly been receiving their proportionate share of tribute from the working of this land by the plaintiffs. All this appears in the several notices of advice of payments issued by the smelters, Syarikat Eastern Smelting Berhad, some of which are exhibited to an affidavit of the defendant, and this would provide a good defence in any action against the defendant on this ground. There further seems to be nothing in the affidavits to show whether or not the consent of the sub-lessees had in fact been obtained in accordance with the provisions of Clause 7 of the sub-sublease in favour of the defendant and so the position in any event would seem in fact to be neutral and equivocal at worst.

Mr. Devadas for the defendant ended his submission with the statement that the Permit to Mine was also bad *ab initio* from its issue on March 6, 1973, to its expiry on March 5, 1974. He did not state on what grounds this statement was made but I presume that this contention is related to the matter of consent of the sub-lessees hereinbefore referred to. I would only observe that notwithstanding this contention the defendant had in fact for the whole period of the Permit been merrily receiving tribute at the agreed rate and operating under its terms, and, indeed, has not hesitated to complain of breaches of its provisions by the plaintiffs during its currency.

The only common ground between the plaintiffs and the defendant is that it is in the interests of all parties that some order should be made for mining operations to commence immediately on the land, but the question is by whom? I have carefully considered, for the purposes of these two applications and without finally deciding them, all the facts of this matter and the merits of the several defences and contentions raised by the defendant and find that on an application of the principles of law which I have adumbrated, the plaintiffs have made out a strong *prima facie* case and the balance of justice and convenience requires an injunction to protect it. I hold that the plaintiffs have made out a case for the maintenance and preservation of the contemporary situation and that there is clear necessity for affording immediate protection to the plaintiffs' rights, that they will in fact suffer irreparable injury for which damages will not necessarily be an adequate remedy (*The Mogul Steamship Company* v. *M'Gregor, Gow, & Co.*[13]) and that in any event it is not just that they should be confined in their remedy to damages (Sachs L.J., in *Evans Marshall & Co. Ltd.* v. *Bertola S.A. and Another, supra*).

I do not think that in making an order in favour of the plaintiffs that I will in fact be finally disposing of their claim but only preserving the *status quo* on a balance of convenience on a consideration of the respective *prima facie* rights on both sides and of the hardship that would enure to the parties in the interim pending trial. Sometimes however the circumstances in which an interlocutory injunction is made are such that if an interlocutory injunction is granted the benefits or advantages which the plaintiff thereby receives are all, or practically all, the benefits or advantages which are sought to be secured at the final hearing. It does not follow, however, that in such a case an interlocutory injunction will necessarily be refused (*Woodford* v. *Smith*[14]); the question remains one of the balance of convenience in all the circumstances.

The plaintiffs state that the land in question has an estimated production life of not more than 6 months according to information supplied by the Inspector of Mines, Batu Gajah, but the defendant does not accept this position. In any event, if the land is worked by the plaintiffs the defendant will continue to be in receipt of tribute and will also be entitled to adequate compensation for any damages she may suffer or incur as a result. I have already stressed the consequence of the land not being worked at all and that the absence of any order would affect the rights of both parties, and repeat that even if an order in favour of the plaintiffs results in virtually giving full relief on their claim in the circumstances, which I do not think it does, I am clearly not precluded from making such an order when the matter is viewed on a balance of convenience in all the circumstances of the case in the light of the principle enunciated in *Woodford* v. *Smith, supra.*

One other matter I must touch on is the forfeiture proceedings apparently instituted by the sub-lessees in the court of the Senior Inspector of Mines, Ipoh, for cancellation of the sub-sublease granted to the defendant on the ground that the defendant had committed a breach in not having employed the requisite number of labourers or labour saving apparatus in mining the land since March 6, 1974. These proceedings before the Senior Inspector of Mines have been transferred to the High Court at Ipoh as Civil Suit No. 4 of 1975, and it is contended by the defendant that any order in that suit would render an order in favour of the plaintiffs in this case nugatory. I do not think that the suit instituted by the sub-lessees should affect my decision in respect of the two cross applications before me, and certainly not at least until such time as an order made therein does in fact have any material bearing on the course of these proceedings. An order that would result in the plaintiffs continuing to work the land would moreover remove the cause of any continuing complaint in respect of the matter raised in the sub-lessees' action.

I would also observe that in any event the defendant's application seeks a mandatory injunction to command the plaintiffs to forthwith dismantle and remove their mining machineries buildings and properties from the land in question. As I have already pointed out, an interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. This is certainly not one of them and I would not in any event, even if I found the balance of convenience in favour of the defendant, make such a mandatory order as prayed for.

However, the difficulty that arises in making an interlocutory order in favour of the plaintiffs to restrain the defendant from working the land without more ado would in fact be just to leave the plaintiffs in possession without being able to work the land, as they will not be able to do this without the issue of a hydraulic licence in their favour by the Senior Inspector of Mines. Merely maintaining the status quo of possession would be to let the land lie idle, so to speak, and result in an otherwise ineffective order for the protection of the plaintiffs' *prima facie* rights. There is, however, the second prayer in the plaintiffs' application for an order directing the Senior Inspector of Mines to renew and/or extend the hydraulic licence in relation to the land in the name of the plaintiffs. This would in fact be virtually a mandatory interlocutory order, but, as I have said, the absence of a hydraulic licence would take the plaintiffs back to the position they were in at the commencement of these proceedings and are still today, i.e., of being in possession without being able to carry on mining operations.

Both parties have agreed some order must be made immediately for the working of the land by one party or the other as otherwise the present state of affairs would render the land subject to forfeiture. Mr. Clark for the plaintiffs informs me that orders of the nature sought directing the issue of a hydraulic licence by the Senior Inspector of Mines to a named party have in fact been made in the past. That may be so, but I am primarily concerned with whether such an order can and should be made in the circumstances of this case. I am fully aware that an order of this nature would in fact be a mandatory interlocutory order but in the exceptional circumstances of this case I shall make such an order as an essentially necessary adjunct to give efficacy to what would otherwise on the first prayer only of the plaintiffs' application to be an impotent and sterile decree in relation to the working of the land.

On a careful consideration of all the circumstances of this case and the necessity for giving adequate protection and safeguards to both sides, I accordingly make the following orders and directions:

(1) Upon the usual undertaking by the plaintiffs, her servants and agents be restrained until after the trial of this action or until further order from working the land held under sub-sublease No. 88/72 for sublease No. 75/70 and described in Mining Certificate No. 5083 for Lot No. 34222 in the Mukim of Belanja in the District of Kinta in the State of Perak.

(2) In addition to the usual undertaking as to damages, the plaintiffs do furnish security within 14 days from today by way of a Bank guarantee or a bond with two sureties in the sum of $200,000 to the satisfaction of the Senior Assistant Registrar of the High Court, Ipoh.

(3) The Senior Inspector of Mines, Perak, do renew or extend the hydraulic licence in relation to the said land in the name of the plaintiffs for a period of one year from the date when security as hereinbefore ordered has been furnished.

(4) The Order made herein on October 22, 1974, be discharged.

(5) The defendant's Motion dated March 21, 1974, be dismissed.

(6) The defendant or an authorised representative to be at liberty to enter on the said land for the purposes of inspection and otherwise in accordance with the terms of the Permit to Mine dated March 6, 1973, or to station an authorised representative on the said land to observe and ensure due compliance with the terms of the Permit to Mine.

(7) Liberty to both parties to apply generally.

(8) The costs of and incidental to both applications to be costs in the cause.

Order accordingly.

Solicitors: *Concison, Lai & Clark; J. R. Devadas.*

SYARIKAT NIP KUI CHEONG TIMBER CONTRACTOR v. SAFETY LIFE AND GENERAL INSURANCE CO. SDN. BHD.

[O.C.J. (Hashim Yeop A. Sani J.) February 22, 1975]
[Kuala Lumpur — Civil Suit No. 1020 of 1974]

Practice and Procedure — Plaintiffs' partnership firm having place of business in Sabah — Whether they can sue in Peninsular Malaysia in firm's name — Carrying on business within jurisdiction — R.S.C. 1957, O.48A r.1 — Courts of Judicature Act, 1964, ss. 3, 4 and 7(2) — Federal Constitution, art. 121.

Order 48A rule 1 of the Rules of the Supreme Court provides in effect that two or more persons claiming as co-partners and carrying on business within the jurisdiction may sue in the name of the firm. The question that arose in this case was whether the plaintiffs who have their place of business in Tawau, Sabah, can sue in Peninsular Malaysia as a firm.

Held: the High Court in Malaya and the High Court in Borneo have separate and distinct territorial jurisdictions, and therefore the plaintiffs could not avail themselves of Order 48A rule 1 of the Rules of the Supreme Court but should sue in the name of the co-partners.

Cases referred to:-

(1) *Noble Lowndes & Partners (a firm)* v. *Hadfields Ltd.* [1939] Ch. 569, 572.

(2) *Chong Thye Pin* v. *Lewis Lazarus & Sons* [1932] M.L.J. 73.

CIVIL SUIT.

R. Manickam for the plaintiffs.

Sri Ram for the defendants.

Hashim Yeop A. Sani J.: This is an application way of Notice of Motion by the defendants seeking for an order that the Specially Indorsed Writ of Summons dated August 23, 1974 be set aside for being in non-compliance of Order 48A Rule 1 of the Rules of the Supreme Court, 1957. Plaintiffs are a firm of contractors having their place of business in Tawau, Sabah, and the defendants are an insurance company having their registered office in Kuala Lumpur.

On August 23, 1974 plaintiffs, suing as a firm, caused to be issued a Specially Indorsed Writ against the defendants claiming *inter-alia* a sum of $26,000 and consequential reliefs. The writ was served on the defendants and the defendants entered conditional appearance and gave notice of same to the plaintiffs' solicitors.

In this Motion the sole preliminary issue is whether on the construction of Order 48A Rule 1 of the Rules of the Supreme Court, 1957 plaintiffs as a firm *have* capacity to sue in the name of the firm. For ease of reference Order 48A Rule 1 is reproduced below:—

"1. Any two or more persons claiming or being liable as co-partners and *carrying on business within the jurisdiction* may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm to be furnished in such manner, and verified on oath or otherwise as the judge may direct." (The italics are mine).

It is obvious, as the marginal note to the order says, that Order 48A Rule 1 deals with actions by and against a firm within jurisdiction. This order enables persons carrying on business in partnership to sue or be sued in the firm's name. But this is a rule made for convenience, and an action by or against a firm notwithstanding this rule remains an action by or against the individual members of the firm — *per* Farwell J. in *Noble Lowndes & Partners (a Firm)* v. *Hadfields Ltd.*[1] at page 572.

Carrying on business within jurisdiction is explained in *Mallal's* Supreme Court Practice at page 649 as follows: —

"Carrying on Business within the Jurisdiction. — There is a well-known rule that if a firm has no place of business in this country held in the name of the firm then they do not carry on business within the jurisdiction even though they employ an agent locally. *Chung Thye Phin* v. *Lewis Lazarus & Sons* [1932] M.L.J. 73; [1932] S.S.L.R. 129. As 'a firm' within this rule is a firm carrying on business within the jurisdiction, the issue of a writ in the name of a foreign firm will be refused unless the names of all the partners are given. It makes no difference whether the partners are within or outside the jurisdiction. The question is 'does the firm there carry on business?' If the firm has no place of business within the jurisdiction they do not carry on business here, even though the partners come to the Federation or Singapore regularly and employ an agent to purchase goods to be sent to the firm abroad. Nor does the employment of the agent who procures orders on commission, but has no power to accept or reject such orders, constitute 'carrying on business in the Federation or Singapore', although the name of the firm is on the door of his office. See *Grant* v. *Anderson* [1892] 1 Q.B. 108, C.A.; *Worcester City and County Banking Co.* v. *Firbank Pauling Co.* [1894] 1 Q.B. 784, C.A."

It is also an established rule that the onus is on the party to show that the firm is carrying on business within jurisdiction. In this case the Statement of Claim itself admits that the plaintiffs are carrying on business in Tawau, Sabah.